

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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1995.05.10



H. THOMAS CADELL, JR., Chief Counsel

MAY 12 1995

Dept. of Industrial Relations
Div. of Labor Standards Enforcement
SACRAMENTO

May 10, 1995

James M. Nelson
Diepenbrock, Wulff, Plant & Hannegan
300 Capitol Mall, Suite 1700
Sacramento, CA 95812-3034

Re: Interpretation and Enforcement Policy:
IWC Order 1, Section 3B

Dear Mr. Nelson:

The Labor Commissioner, Victoria Bradshaw, has asked this office to respond to your letter of February 22, 1995, requesting clarification of the Division's policy in regard to alternative workweek arrangements in the manufacturing industry.

In your letter you ask us to address a situation wherein an employee on an alternative regularly scheduled four-day, 10-hour day workweek is scheduled to work Monday through Thursday. In the scenario you paint, the worker is out ill all day Thursday and is then permitted by the employer to "make up" that time by working Friday. You wish to emphasize that the reasons the fourth day of the regularly scheduled workweek is not worked and alternative arrangements are made to allow the employee to work on a separate day are attributable to the illness and/or convenience of the employee and are not a result of scheduling by the employer.

In your letter you express surprise that a Deputy Labor Commissioner in Sacramento takes the view that the time worked on Friday must be compensated at premium rates¹. We would like to assure you that such is the interpretation of the provisions of the wage order and explain to you why this is so.

¹Further, you attribute a contrary position to a Mr. "Ricovo" in our San Francisco office who seemed to agree with your analysis that since the employee had not exceeded either the 10 hours per day or 40 hour per week threshold, the accommodation of the employee on Friday did not trigger an overtime obligation. We have no Deputy Ricovo but I contacted Deputy Rucobo who works on the Division's public information line here in San Francisco. I assume that this is the individual you spoke to. Deputy Rucobo assures me that he understands the enforcement position of the Division and would not have told you that there was no overtime obligation under the circumstances outlined above. Obviously, there was a misunderstanding for which, of course, we apologize.

Initially, allow me to direct your attention to the provisions of Interpretive Bulletin 89-3 which addresses the question of the intent of the IWC in adopting the language regarding work beyond the "scheduled hours" and summarizes the long-standing position of the Labor Commissioner. Page 4 of the Interpretive Bulletin at the next paragraph provides:

"The IWC, in effect, required a trade-off for exemption from the overtime requirements after eight hours. It would not require such overtime as long as employees' hours were agreed to by the employees and "regularly scheduled." In order to ensure that employers respect the "regular schedules" which provide for no overtime after eight hours, the IWC made the policy choice to require overtime whenever hours are worked beyond the regular schedule. Certainly, many employees and employers may desire more flexibility in scheduling, however, again, that is a policy choice that can only be made by the IWC."

The above-cited conclusion is premised upon the Statement of Basis adopted by the IWC which clearly indicated that the term "regularly scheduled" was a term which was not used without forethought.

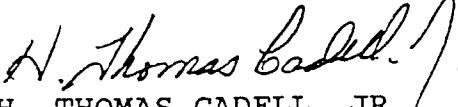
Addressing some of the consequences you see of adoption of this policy, we would point out that many state laws involving minimum labor standards might be considered as impediments to "reasonable accommodation" provisions of the ADA and other federal and state laws which are designed to discourage discrimination. For instance, the state's current eight-hour provisions would preclude the flexible scheduling which you cite as bedrock principles of the Federal Family Medical Leave Act and the ADA. We know of no interpretation of these anti-discrimination laws which would result in a required exception to the state-mandated overtime laws.

While the IWC Orders do not always provide the flexibility desired by both employers or employees, it is not within the jurisdiction of the Labor Commissioner to change the requirements mandated by the IWC. You might be interested to know, however, that there has been legislation (AB 398) introduced to eliminate daily overtime to provide the kind of flexibility your client desires.

I hope this adequately explains the enforcement policy of the DLSE in regard to this issue. We thank you for your interest in California labor laws and invite your continued interest.

James M. Nelson
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Yours truly,


H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner
Dale Louton, Sr. Deputy, Sacramento
Gonzalo Rucobo, DLC I, San Francisco